No. 9242

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

West Coast Life Insurance Company (a corporation), Pacific National Bank of San Francisco (a national banking association), et al.,

Appellants,

vs.

Merced Irrigation District and ~~Reconstruction Finance Corporation,~~

Appellees.

BRIEF FOR APPELLANT MARY E. MORRIS ON ISSUE OF RES JUDICATA.

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STATEMENT OF THE CASE.

The Court granted permission to appellant, Mary E. Morris, to file on behalf of the appellants in the above cause this separate brief on the issue of *res judicata.*

The assignments or designations of error on the point are quoted in an Appendix, pages i to iv.

Appellants are bondholders of respondent, Merced Irrigation District.

(Throughout the italics are ours.)

The judgment relied on is a judgment of this Court which reversed a judgment of the United States District Court on the ground that *the grant of judicial power* under which the latter Court had acted in entering a decree which impaired the obligations of the bonds held by the appellants was outside the bankruptcy clause of the Constitution and on that ground void. This Court's judgment directed the District Court to dismiss the prior proceeding. The latter Court entered its decree accordingly.

This cause involves the same bonds and it involves *an identical grant of Federal judicial power* and an attempt to base such grant upon the same provision of the Constitution. And the new grant is made in the same terms and for precisely the same purpose and it has resulted in precisely the same decree.

As the rule of *res judicata* applies to determination of questions of law; to the construction of the Constitution itself, to the validity of all grants of power; whether administrative or judicial, appellants here contend that the question of construction of the Constitution answered in the first proceeding is decisive of the same question in this second proceeding.

> Complete references to the evidence in support of the plea are set out in the Appendix, pages iv to ix.
>
> Much of this evidence is contained in Respondents' Exhibit "OO", a printed Transcript of the record on the appeal to this Court in the prior proceeding. Owing to the decision in the *Ashton* case hereinafter referred to, this Court dispensed with the printing of the said record, but the record

was printed on an application of the respondent District to the Supreme Court for certiorari, which application was denied. (In the trial court the appellants here were designated respondents. Hence the said exhibit designation.)

For the Court's convenience, we, at the end of this opening Statement, quote the terms of the two grants of judicial power involved and also show the Court made the same determinations and the same decree in the two causes.

It will be noted that in legal history no precedent can be found for what is here involved—an attempt to avoid a judgment that a Federal United States District Court cannot be given power to impair in bankruptcy the public obligations of an agency of a sovereign state, by obtaining from the same authority, Congress, an act containing another grant of the same judicial power. Not even different words were used in making the second grant of power.

The Supreme Court makes it clear in the following case that the rule of *res judicata* applies to grants of judicial power.

Stoll v. Gottlieb, 305 U. S. 165, 83 L. ed. (Adv. Sheets) p. 116.

The Supreme Court held in that case that a certain final order made in a federal bankruptcy proceeding had conclusively adjudicated that the District Court had jurisdiction. The question involved was one of law appearing on the face of the record.

We do not contend at all that the rule of *res judicata* applies to mere questions of judicial procedure or that

a litigant can acquire a vested right as against his adversary to have every cause that arises between the two parties erroneously tried. That is not this case. Merced Irrigation District brought the prior proceeding to readjust its obligations upon the identical bonds held by these appellants. These appellants claimed that it was not competent for Congress, acting under the bankruptcy clause of the Constitution to grant *Federal judicial power* to a United States District Court to discharge those bonds by fastening a new type of debts on the district, because those bonds are public obligations or obligations of an agency of a sovereign State; that they were therefore immune from the attempted impairment. This Court so held. And it further held and necessarily held that the State could not invite, or consent to, the exercise of the power because of the contract clause. As is shown in the case of *United States v. Moser,* 266 U. S. 236, 69 L. ed. 262, any question of law becomes *res judicata,* when it involves the application of a particular statute to a particular demand or a demand of the same identical kind, even though the causes of action are different. For the purpose of the rule suits for separate installments due under the same contract are different causes. In the case cited, the plea in Moser's favor was sustained. One of the cases cited by the Government dealt with a prior adjudication that the terms of a statute, coupled with what had been done under it by one, Boyd, constituted a contract and Boyd pleaded *res judicata;* but it appeared that in the prior proceeding, which was treated as being upon a separate cause, the constitutionality of the statute was not passed upon or in any

manner determined and hence the plea was not sustained. This objection was raised in the second proceeding. The Supreme Court said:

> "Courts seldom undertake, in any case, to pass upon the validity of legislation, where the question is not made by the parties. Their habit is to meet questions of that kind when they are raised, but not to anticipate them. * * * Previous adjudications upon other points do not operate as an estoppel against parties *in new causes,* nor conclude the court upon the constitutionality of the Acts, because that point might have been raised and determined in the first instance."
>
> *Boyd v. Alabama,* 94 U. S. 645, 24 L. ed. 302.

But obviously had the constitutionality of the law been raised in the first cause, the determination would have bound in the second cause.

Note at once that Moser's prior judgment was upon a different cause of action, but the legal question was one of right under a statute that determined the second cause if it determined the first. The two causes of action were as separate as are suits upon different bonds of the same issue. In such a case, the prior judgment does not bind except as to questions actually raised and determined.

> *Nesbit v. Independent Dist. of Riverside,* 144 U. S. 610, 36 L. ed. 562.

But the Supreme Court, in the case of *United States v. Moser* clearly recognized the rule that if the question of law arises in the first case and is determined, it is as if a relevant question of fact has been determined.

Note that the *Boyd* case said that the constitutional question was not involved. Note the effect of the judgment invoked in the following case which supplied that omission. The question was, whether a bank's charter exempted it from certain taxes for the period of the charter. Of the answer in the first case, the Court said:

> "The answer besides averred that the clause of the charter exempting the bank from taxation *was in violation of the constitution* of the state of Louisiana of 1812, in force at the time the charter was granted, and that it also violated subsequent constitutions, and particularly the clause in the constitution of 1868, to which reference has already been made. * * *
>
> Upon these issues there was judgment in favor of the bank, declaring the assessment null and void, and perpetuating the injunction."
>
> 167 U. S. at pages 379 and 380.

The Court further said:

> "Of course, if the judgments are the thing adjudged, and conclusively determine as between the parties that the exemption of the bank under its charter exists, to the extent determined by the judgments, the duty in that regard of discussing the charter itself will be eliminated, since the effect of the thing adjudged will settle the question."
>
> Id. page 387.

The Court noted the contention that:

> "* * * a judgment decreeing a tax of one year illegal can never be *res judicata* as to a tax for a

future year, although the right to tax for a future year is resisted upon the same facts and between the same parties and *upon identical legal grounds* held to be conclusive in a judgment previously rendered between them."

Id. page 388.

The Court also said:

"The second question then is this: Were the final judgments *which held that there was no power to levy the taxes* on the Citizens' Bank for the years 1886 and 1887 based upon *the identical claim of exemption* now asserted by the bank in order to defeat the taxes here in question?

And we ask the Court to note the following statement made by the Supreme Court, in deciding the question:

"In *Bank of United States v. Beverly,* 42 U. S. 1 How. 134-139, it was held that a construction of a will affecting the rights of the parties must govern in subsequent controversies between the same parties, *without reference to the different nature of the demands.* In *Tioga R. Co. v. Blosburg & C. R. Co.,* 87 U. S., 20 Wall. 137, and *Mason Lumber Co. v. Butchel,* 101 U. S. 638, *it was held* that when the proper construction of a contract was in controversy, *the construction adjudged by the court would bind the parties in all future disputes.*"

New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202.

We believe that no criticism of these parts of this decision has been made, except upon the ground that a

decision relative to the validity of taxes for one tax year should not be held *res judicata* for later years, on the ground of public policy.

Notice the next to the last quotation above. The prior judgment invoked was rendered on the theory that there was "no power" to tax. So here the prior judgment was on the theory there was "no power" to impair these bonds.

The foregoing will make clearer the attack made upon the repetition of the grant of Federal judicial power here involved.

The appeal is from an interlocutory decree rendered by the United States District Court for the Southern District of California on February 21, 1939 (Tr. p. 235, Vol. 1), in a proceeding begun by respondent on June 17, 1938 (Tr. p. 8, Vol. 1), under *Section 83* of the Bankruptcy Act. This decree confirmed a plan of composition of the bonded indebtedness of said district.

The plan is that the bonded indebtedness of Merced Irrigation District amounting to $16,190,000.00 and interest accruing on and after July 1, 1933, shall be settled for 51.501% of principal, the money to be procured through a new bond issue to be taken by the Reconstruction Finance Corporation.

Appellants invoke a final decree of this Court rendered on April 12, 1937, on an appeal taken by them from a decree of the same United States District Court. The prior proceeding was brought by Merced Irrigation District under *Section 80* of the Bankruptcy Act against the appellants. The decree so

previously appealed from confirmed the same plan of composition of the same bonded indebtedness. Appellants contend that the rule of *res judicata* applies to *questions of law* as well as to questions of fact; that the grant of *Federal judicial power* under which the District Court acted in rendering its prior decree was the same as the grant of *Federal judicial power* under which the District Court acted in rendering the decree now appealed from. They contend that the said decree of this Court so invoked finally adjudged that such grant of power is unconstitutional, is beyond the power of Congress to make under the bankruptcy clause (Art. I, Sec. 8); that it adjudged that the exercise of *Federal judicial power* so granted would, because of the character of the indebtedness involved, constitute interference by the Federal Government with the sovereignty of the State of California; and secondly that the state was powerless to waive such interference or approve the remedy because of the contract clause (Art. I, Sec. 10) which prohibits the state from passing insolvency laws which affect existing contracts. As will appear, Section 80 accorded due process of law to the extent of providing a fair hearing. And it required a fair plan. There was nothing in the prior ruling which suggests that the fairness or moderation with which Federal judicial power might be exercised would save the Federal remedy. The remedy was condemned as inconsistent with state sovereignty and the state was held incapable of waiving the objection. The wisdom and moderation of the physician played no part in the decision. The point was that the physician, the United States District

Court, was unlicensed and that the lack of license could not be waived.

It is of course clear that the power of debt composition is nothing but bankruptcy power.

Continental Ill. N. B. & T. Co. v. C. R. I. & P. R. Co., 294 U. S. 648, 79 L. ed. 1111.

Long before the *Ashton* case, the elementary rule was that an enforced bankruptcy composition had to be fair and the Supreme Court in the *Ashton* case, obviously refused to save the grant of judicial power contained in Section 80 because the plan had to be 100 per cent fair.

And it was familiar law before the *Ashton* case was decided, that certain exertions of unusual authority by the Federal Government were permitted if the State consented. Of the operation of the Maternity Act it was said:

> "Probably it would be sufficient to point out that the powers of the state are not invaded, since the statute imposes no obligations but simply extends an option which the state is free to accept or refuse."
>
> *Massachusetts v. Mellon,* 262 U. S. 447, 67 L. ed 1078.

When a person obtains a judgment that a statutory grant of power—whether administrative or judicial—is void, he may not be endlessly required to re-try the issue by repeating the grant in new statutes.

We shall make it clear that under a constitutional government, the judiciary may test every grant of power that the legislative department may make and

that judgments as to such power are as final as are any judgments and are within the rule of *res judicata.*

We refer to the two sections:

Sec. 80, Bankruptcy Act, adopted *May 24, 1934,* Chap. 343, 48 Stat. at L. p. 798;

Sec. 83, Bankruptcy Act, adopted *Aug. 16, 1937,* Chap. 657, 50 Stat. at L. p. 653.

It is new kind of constitutional law to hint that judicial power of the Federal government is so mild that it may almost be said to be regulated by the States. Power within a Federal court is a part of the supreme sovereignty of the United States, and all means of executing the power is within the grant of the power. Said Chief Justice Marshall, in the following case:

> "One of the counsel for the defendants insists that Congress has no power over executions issued on judgments obtained by individuals; and that the authority of the states, on this subject, remains unaffected by the constitution. That the government of the Union cannot, by law, regulate the conduct of its officers in the service of executions on judgments rendered in the federal courts; but that the state legislatures retain complete authority over them.
>
> The court cannot accede to this novel construction. The constitution concludes its enumeration of granted powers, with a clause authorizing Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United

> States, or in any department or officer thereof. The judicial department is invested with jurisdiction *in certain specified cases,* in all which it has power to render judgment.
>
> That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer. The terms of the clause neither require nor admit of elucidation. The court, therefore, will only say, that no doubt whatever is entertained on the power of Congress over the subject. The only inquiry is, how far has this power been exercised?''
>
> *Wayman v. Southard,* 10 Wheat. 1, 21, 22, 6 L. ed. 258.

It was of this high judicial power that the Supreme Court spoke in the *Ashton* case, which case was the basis of the prior decision of this Court.

Plainly the judicial department must determine whether the case is one of the *''specified cases'';* must determine whether a particular grant of judicial power may be made to a United States District Court.

We shall make it clear that in so far as grant of judicial power to, and restrictions on the judicial power of, the United States District Court are concerned the two sections are in the same terms. They in fact produced precisely the same judgment.

The judgment was not that Section 80 did not make provisions appropriate for a bankruptcy law or did

not accord due process of law, if there was power to adjudicate, or that a fair plan was prohibited. The judgment was that as the debts involved were public debts, the sovereignty of the State prohibited their settlement or discharge through a department of another sovereignty, the making of a decree by a Federal District Court which would fasten a new type of obligations upon the State agency in lieu of the old.

This Court's ruling on the said appeal is reported.

Bekins v. Merced Irr. Dist., 89 F. (2d) 1002.

On the going down of this Court's mandate, the United States District Court entered its decree on July 6, 1937, unconditionally dismissing the prior proceeding. That decree also is invoked in support of the plea.

This Court's ruling was based on the decision of the United States Supreme Court in the *Ashton* case decided on May 25, 1936.

Ashton v. Cameron Co. Water Improvement Dist., 298 U. S. 513, 80 L. ed. 1309.

That the *Ashton* case did, in unmistakable terms, decide the two issues mentioned, note carefully what is next quoted from the opinion in that case.

> "The especial purpose of all bankruptcy legislation is to interfere with the relations between the parties concerned—to *change, modify* or *impair* the obligation of their contracts. The statute before us expresses this design in plain terms. *It undertakes to extend the supposed power of the Federal Government incident to bankruptcy over any embarrassed district which may apply to the*

court. See Perry v. United States, 294 U. S. 330, 353, 79 L. ed. 912, 918, 55 S. Ct. 432, 95 A.L.R. 1335.

If obligations of States or their political subdivisions may be subjected to the interference here attempted, they are no longer free to manage their own affairs; the will of Congress prevails over them; although inhibited, the right to tax might be less sinister. And really the sovereignty of the State, so often declared necessary to the federal system, does not exist. M'Culloch v. Maryland, 4 Wheat. 316, 430, 4 L. ed. 579, 607; Farmers & M. Sav. Bank v. Minnesota, 232 U.S. 516, 526, 58 L. ed. 706, 711, 34 S. Ct. 354.

The Constitution was careful to provide that 'No State shall pass any Law impairing the Obligation of Contracts.' *This she may not do under the form of a bankruptcy act or otherwise.* Sturges v. Crowninshield, 4 Wheat. 122, 191, 4 L. ed. 529, 547. *Nor do we think she can accomplish the same end by granting any permission necessary to enable Congress so to do."*

Ashton v. Cameron County W. I. District, 298 U. S. 513, 530, 80 L. ed. 1309, 1314.

Note the two-fold ruling. The case answers with precision the question involved in this case.

In the *Brush* case the Supreme Court itself later stated exactly what it had ruled in the *Ashton* case.

"We recently have held that the bankruptcy statutes could not be extended to municipalities or other political subdivisions of a state. Ashton v. Cameron County Water Improv. Dist., 298 U.S. 513, 80 L. ed. 1309, 56 S. Ct. 892, 31 Am. Bankr.

> Rep. (N.S.) 96. The respondent there was a water-improvement district organized by law to furnish water for irrigation and domestic uses. We said (pp. 527, 528) that respondent was a political subdivision of the state 'created for the local exercise of her sovereign powers, * * * Its fiscal affairs are those of the State, not subject to control or interference by the National Government, unless the right so to do is definitely accorded by the Federal Constitution.' In support of that holding, former decisions of this court with respect to the immunity of states and municipalities from federal taxation were relied upon as apposite. The question whether the district exercised governmental or merely corporate functions was distinctly in issue."
>
> *Brush v. Commissioner of Int. Rev.,* 300 U. S. 352, 81 L. ed. 691, 698.

The later case of *United States v. Bekins* upheld Section 83. It upheld the making of a decree of debt composition by the Federal Court, by the condemned agency of the *Ashton* case, and pronounced that such decree, vital to the whole proceeding, benefits and does not offend State sovereignty—particularly if the State consents. Secondly, it held that the contract clause does not stand in the way of such consent.

> *United States v. Bekins,* 304 U. S. 27, 82 L. ed. 1137.

The latter case in effect holds that the contract clause does not prohibit an invitation to the federal government to act. That is squarely in the face of the *Ashton* case.

This Court will be amazed to note *that as regards grant of power to the District Court and as regards restriction on power* (the part of the two laws with which we are concerned), the language of Section 83 is lifted from Section 80. We shall later do the comparing.

The Court will not therefore be at all amazed to note that the "fruit of the law", the judgment under each section, is the same.

All that is essential for these appellants to show is that a part of Section 80 determined to be invalid is an indispensable requirement of Section 83.

It is clear that the making of the decree by the condemned federal agency is the operative part, the effective part of Section 83—the offensive part under the *Ashton* case.

Note that the very consent which the Supreme Court upheld in the *Bekins* case, was in effect when the first bankruptcy proceeding was begun by Merced Irrigation District. The State act took effect as an emergency measure on *September 20, 1934.*

Cal. Stats. 1935, p. 5 (ex. sess. 1934 Chap. 4).

The first proceeding was begun on *April 19, 1935.*

Respondent contends that this prior determination was made under and relates to a different statute and further that the prior determination was rendered by a Court acting without jurisdiction and that the judgment of such a Court will not support the plea of *res judicata.* The trial Court sustained respondent's position.

In re Merced Irr. Dist., 25 Fed. Supp. 981, 987; Printed Opinion Tr. pp. 168, 186, Vol. I.

Neither contention is correct. Where a private litigant has obtained a judgment against his adversary that a part of a statute containing a grant of administrative or judicial power which affects the litigant's property rights is unconstitutional, the judgment confers a vested right although it may be subsequently determined that it is erroneous. Such judgment cannot be destroyed by incorporating the same grant of power in a later statute. The rule of *res judicata* is essential to judicial power.

Secondly the judgment relied on was a judgment of this Court rendered on proper appeal on the very question of jurisdiction. It was a judgment on the merits as to jurisdiction. That was ruled, in effect, in the late case of *Stoll v. Gottlieb* hereinbefore cited. And that case cites cases which are directly in point. It is common for supervisory Courts to determine the legal question of jurisdiction. In fact, as will be shown, a writ of prohibition will not issue if the complainant has a plain, speedy and adequate remedy by appeal. It is common to enjoin exercise of power contained in an invalid grant. And the legislature may not destroy the judgment by a new act.

As will appear, it may not be advisable to seek prohibition and refrain from appeal *because in some states both parties are not necessary parties in a prohibition proceeding.*

The evidence shows that in the former trial the appellants herein objected to jurisdiction both by way of motion to dismiss and in their answers; that they assigned the error on appeal and that, following

the decision in the *Ashton* case, they moved this Court to dispense with the printing of the record on appeal which had been filed in this Court and for a judgment of reversal with directions to dismiss on the ground that the *Ashton* case determined the question of jurisdiction and that they were entitled to a decree putting an end to the litigation; that the Court granted the motion and made the judgment applied for on April 12, 1937; that the District's application to the Supreme Court for certiorari was denied; that pursuant to this Court's mandate the trial Court entered its decree of dismissal on July 6, 1937.

At the opening of the references to the evidence in support of the plea, we have cited (see Appendix, page iv) various cases on what evidence is relevant to the plea. It is shown that this Court may take judicial notice of its own records that relate to the plea.

THE QUESTION INVOLVED.

The prior judgment determined the very question as to whether under the bankruptcy clause of the Constitution (Art. I, Sec. 8), Congress could grant to the United States District Court, a federal agency, the power to make a decree which would fasten on the irrigation district a new type of indebtedness and thereby discharge its existing bond obligations held by appellants; whether that would interfere with State sovereignty in view of the fact the indebtedness was public and whether the State had power to waive the interference and adopt the remedy under the contract clause. (Art. I, Sec. 10.)

We have referred to the recent case of *Stoll v. Gottlieb*. We are obviously dealing with a grant of great judicial power when concerned with a compo-

sition of bonded indebtedness amounting to $16,190,000.00.

> "In bankruptcy matters composition has a special meaning to-wit, a settlement or adjustment *which is enforced by the court* on all creditors after its acceptance by the required majority."
>
> *In re West Palm Beach,* 96 F. (2d) 85.

It is scarcely necessary to state that the contract of any political subdivision of a state may be enforced by appropriate remedies and that the doctrine of *res judicata* applies to judgments which affect bonds of such a political subdivision.

> *Cromwell v. County of Sac.,* 94 U. S. 351, 24 L. ed. 195.

While a bankruptcy proceeding is partly *in rem* nevertheless the bankrupt and the creditors are ordinary adversaries in a contest over a composition and a final order made in favor of a bankrupt debtor in such a proceeding is *res judicata* of any issue determined therein.

> *Myers v. International Trust Co.,* 263 U. S. 64, 68 L. ed. 165.

The same rule of course applies in favor of the contesting creditor.

Under Point III we discuss the rule that under a constitutional form of government the Courts construe the Constitution. In the following case the Supreme Court proceeded to construe the Constitution, the *limitation* therein on the power of Congress, the provision that "No tax or duty shall be laid on

any articles exported from any state" (Art. I, Sec. 9). A law had been passed compelling the stamping of an export bill of lading. The Supreme Court reviewed a conviction under the law. The Solicitor General argued: "This tax has been used for one hundred years", etc. (45 L. ed. 863.) But the law was invalidated on the ground that a correct construction of the constitution excluded the enactment. The Court spoke of its power to construe the Constitution and the care to be used. It said:

> "In the light of this rule the inquiry naturally is, Upon what principles and in what spirit *should the provisions of the Federal Constitution be construed?* There are in that instrument *grants of power, prohibitions, and* a general *reservation of ungranted powers.* That in the grant of powers there was no purpose to bind governmental action by the restrictive force of a code of criminal procedure has been again and again asserted. The words expressing the various grants in the Constitution are words of general import, and they are to be construed as such, and as granting to the full extent the powers named."
>
> *Fairbanks v. United States,* 181 U. S. 283, 287, 45 L. ed. 862, 864.

There are varying degrees of similarity between causes of action which are technically different. Technically, separate causes of action are not the same when they rest on the same contract; but in such a case the affiliation between the two suits is close. Here it is perfectly apparent that the relief claimed in this new proceeding must be rested upon the iden-

tical provision of the Constitution on which Section 80 was based. As regards terms of the grant of power the two sections are same. Natural indeed, therefore, it is to invoke the rule of *res judicata.*

We are dealing here with the construction of a power given to Congress; of a grant under that power. A letter of attorney may be construed by a judgment and the judgment be conclusive in a subsequent suit between the same parties. In the following case a "letter of attorney" given by one Lenton and wife, was, on a trial, construed for the purpose of determining whether it embraced the power to borrow money and whether it was in legal form. Judgment went against the principals on the question. In a second suit involving another cause of action, they raised the same *legal questions.* The Circuit Court of Appeals for the 8th Circuit, through Mr. Justice Sanborn, referred to the first suit and the issues determined thereby, and sustained the plea of *res judicata.*

The Court said:

> "Mr. and Mrs. Lenton answered this complaint that Finlay was not authorized, by this letter of attorney or otherwise, to borrow any money, or to make any note or mortgage on their behalf and that the letter of attorney had not been executed according to law and was not binding on them. The issues thus made were tried upon their merits, and a judgment was rendered by the County Court of Douglas County in favor of the insurance company for the full amount claimed in its complaint. At the trial which re-

sulted in that judgment the question whether or not the terms of the letter of attorney were sufficient to authorize Finlay to borrow money for appellants to execute notes therefor in their names and the question as to whether or not the certificate of acknowledgment was in accordance with the statutes were raised, litigated, argued and decided by the court against the appellants. The court of Douglas County held that the power vested by the terms of the letter of attorney was ample to enable Finlay to borrow money and to make the notes, and that the certificate of acknowledgment of the execution of the letter of attorney was in due and legal form. The judgment in that action conclusively estops the appellants from again litigating those questions." (Citing cases decided by the United States Supreme Court.) "* * * This suit is between the same parties who were involved in the action upon the coupon note due June 1, 1895, *but upon a cause of action different from that then in controversy* and every point and question which was actually and necessarily litigated and decided in that action is *res judicata* in this. The question as to whether or not the terms of the letter of attorney were broad enough to empower Finlay to borrow money for the appellants and to execute their notes to secure a new debt and the question as to whether or not the certificate of acknowledgment was in accordance with the law were raised, litigated and decided in that action and the appellants are conclusively estopped by the judgment therein from again presenting or litigating them here."

Lenton v. National Life Ins. Co. (8th Ct.), 104 F. 584, 587, 588.

The prior proceeding to which sought to impair the same bonds; and also in the same way, although the latter is not material to the point.

While technically bankruptcy alleged on one day is not bankruptcy alleged on a later day the two proceedings are in the same category. There was scarcely a hitch in the process of debt extinguishment here. It is not a case of a cause of action in ejectment and a later suit in equity to quiet title involving the construction of the same patent from the Federal government. There is even closer affinity here. The affinity is as close as between identical twins. They have the same origin, although one comes a little later.

Each section, Section 80 and Section 83, obviously stems from the same clause of the Constitution. It is a typical case of invoking a judgment settling a construction of an instrument which lies at the base of two suits. Note the following case.

The United States brought suit to quiet title to certain lands. Its claim of title depended on whether a certain map was a map of definite location under a railroad grant which definite location would remove such land from the operation of a junior grant to the Southern Pacific Railroad Company, the prior grant having been forfeited *subsequently* to the junior grant, so that the forfeiture would not feed the junior grant if the map amounted to a definite location. The United States prevailed on this issue. In a second suit, it was held that this judgment was *res judicata* on the character of this map. The second suit was

upon a different cause of action, an action to quiet title to other lands within the senior grant. The case was most elaborately and carefully argued. The court in applying the rule of *res judicata* said:

> "The general principle announced in numerous cases is that a *right, question* or *fact* distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; *and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established,* so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination."
>
> *Southern Pacific R. Co. v. United States,* 168 U. S. 1, pages 48, 49, 42 L. ed. 355, 377.

Federal Courts have authority to determine the validity of grants of power to a "judicial functionary". The trial court may pass on the question preliminarily.

> *Snead v. Central of Georgia Ry. Co.,* 151 F. 608.

But we are here concerned with a determination of this Court, a Court empowered to pass with finality on the constitutionality of grants of power to United States District Courts, to determine conclusively that a grant of judicial power is void.

We refer here to one of the cases declaring that the question determined by the prior judgment may be either one of law or of fact and referring to the importance of the rule of *res judicata.*

> "The general principal, applied in numerous decisions of this court, and definitely accepted in Southern Pacific R. Co. v. United States, 168 U.S. 1, 48, 49, 42 L. ed. 355, 376, 377, 18 Sup. Ct. Rep. 18, is, that *a question* of fact *or of law* distinctly *put in issue and directly determined* by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties sui juris, *is conclusively settled by the final judgment* or decree therein, *so that it cannot be further litigated* in a subsequent suit between the same parties or their privies, *whether the second suit be for the same or a different cause of action.*"
>
> *Oklahoma v. Texas,* 256 U. S. 70, 85, 65 L. ed. 831, 834.

The rule is indispensable to a judicial system.

> "This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to the end that *rights once established by the final judgment* of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, whenever the judgment is entitled to respect. Kessler v. Eldred, supra.
>
> *Hart Steel Co. v. Railroad Supply Co.,* 244 U. S. 294, 299, 61 L. ed. 1149, 1153.

We have this striking situation:

1. The agency which under Section 83 put into effect the plan was the same condemned federal agency—the United States District Court.

2. The terms of the new act are the same as those of the old in so far as grant of power to the said Court is concerned.

3. A new decree of the precise terms as the old has been made.

4. The State consented to the proceeding in each case.

THE TWO GRANTS OF JUDICIAL POWER ARE IN THE SAME TERMS.

We next quote from and comment upon the language of the two sections and then refer to the findings and decrees in the two cases:

First as to restrictions on powers.

Subdivision (c) of Section 80 prohibited the Court from interfering with governmental powers of the State, the language being——

> "* * * but (11) shall not, by any order or decree, in the proceeding or otherwise, interfere with (a) any of the political or governmental powers of the taxing district, or (b) any of the property or revenues of the taxing district necessary in the opinion of the judge for essential governmental purposes, or (c) any income-producing property, unless the plan of readjustment so provides."

The end of subdivision (c) of Section 83 contains the same prohibition in the following language:

> "* * * but shall not, by any order or decree, in the proceeding or otherwise, interfere with (a) any of the political or governmental powers of the petitioner; or (b) any of the property or revenues of the petitioner necessary for essential governmental purposes; or (c) any income-producing property, unless the plan of composition so provides."

So much for the restrictions which each section placed upon the power of the Court. We may well contend that these specific restrictions limited the grants of power to the Court which were found in Section 80. These are provisos and have the usual purpose of provisos. But we do not need to invoke this rather obvious rule.

Section 83 contains the same grant of power to the Court, the Federal agency, which is found in Section 80.

We quote the grant of power to the District Court contained in Section 80:

> "(e) After hearing such objections as may be made to the plan, the judge shall confirm the plan if satisfied that (1) it is fair, equitable, and for the best interests of the creditors, and does not discriminate unfairly in favor of any class of creditors; (2) complies with the provisions of subdivision (b) of this chapter; (3) has been accepted and approved as required by the provisions of subdivision (d) of this chapter; (4) all amounts to be paid by the taxing district for

services or expenses incident to the readjustment have been fully disclosed and are reasonable; (5) the offer of the plan and its acceptance are in good faith; and (6) the taxing district is authorized by law, upon confirmation of the plan, to take all action necessary to carry out the plan. *Before a plan is confirmed, changes and modifications may be made therein,* with the approval of the judge after hearing upon notice to creditors, subject to the right of any creditor who shall previously have accepted the plan to withdraw his acceptance, within a period to be fixed by the judge and after such notice as the judge may direct, if, in the opinion of the judge, the change or modification will be materially adverse to the interest of such creditor, and if any creditor having such right of withdrawal shall not withdraw within such period, he shall be deemed to have accepted the plan as changed or modified: *Provided, however,* that the plan as changed or modified shall comply with all the provisions of this subdivision."

We next quote the grant of power as contained in Subdivision (e) of Section 83:

"(e) At the conclusion of the hearing, the judge shall make written findings of fact and his conclusions of law thereon, and shall enter an interlocutory decree confirming the plan if satisfied that (1) it is fair, equitable, and for the best interests of the creditors and does not discriminate unfairly in favor of any creditor or class of creditors; (2) complies with the provisions of this chapter; (3) has been accepted and approved as required by the *provisions* of subdivision (d) of

this section; (4) all amounts to be paid by the petitioner for services or expenses incident to the composition have been fully disclosed and are reasonable; (5) the offer of the plan and its acceptance are in good faith; and (6) the petitioner is authorized by law to take all action necessary to be taken by it to carry out the plan. If not so satisfied, the judge shall enter an order dismissing the proceeding."

Note the "1", the "2", the "3", the "4", the "5" and the "6".

Next note that, to be sure the plan will be fair, Section 83, provides also for modification. We quote from Section 83:

"*Before a plan is confirmed, changes and modifications may be made therein,* with the approval of the judge after hearing upon such notice to creditors as the judge may direct, subject to the right of any creditor who shall previously have accepted the plan to withdraw his acceptance, within a period to be fixed by the judge and after such notice as the judge may direct, if, in the opinion of the judge, the change or modification will be materially adverse to the interest of such creditor, and if any creditor having such right of withdrawal shall not withdraw within such period, he shall be deemed to have accepted the plan as changed or modified: *Provided, however,* That the plan as changed or modified shall comply with all the provisions of this chapter and shall have been accepted in writing by the petitioner."

Bankruptcy Act, Sec. 83.

Neither Einstein or a school boy could say that the use of the Federal Court decree condemned in the *Ashton* case is not indispensable to Section 83, that it is not the thing that spells the doom of these respondents' bonds heretofore held immune from the authority sought to be exercised.

Is it amazing that the same judgment was borne under Section 83 as was borne under Section 80?

It is true that Section 80 refers to the first decree as a final decree and it states in Subdivision (d):

> "* * * the final decree shall discharge the taxing district of those debts and liabilities dealt with in the Plan except as provided in the Plan"; etc.

In Section 83, the decree on the merits is called an interlocutory decree and that decree is the one that is made appealable, but when the Court determines that the Plan has been carried out, a decree called a "final decree" is entered and it is the decree which discharges the district from its debts except as dealt with in the Plan. Subdivision (f) of the new section reads:

> "And thereupon the court shall enter a final decree determining that the petitioner has made available for the creditors affected by the plan the consideration provided for therein and is discharged from all debts and liabilities dealt with in the plan except as provided therein," etc.

If the rights of a bondholder are annihilated he is not concerned whether the decree that does that is called an interlocutory decree or a final decree.

In the following case the Court very properly declared the *Bekins* case overruled the substance of the *Ashton* case.

Supreme Forest Woodmen Circle v. City of Belton, 100 F. (2d) 655 at p. 657.

Of necessity that is so because each section expressed the same judicial power in practically the same terms and Section 83 lets us go as far but no further than Section 80, if the provisos quoted mean anything.

It is not necessary to sustaining here the plea of *res judicata* that this Court shall determine that Section 83 is precisely the same as Section 80. We are concerned with the substance of the determination in the *Ashton* case and that determination was that if the putting into effect of new indebtedness of an irrigation district was in any way made dependent upon the trial and investigation and determination of a United States District Court the result was an unauthorized interference with the sovereignty of the State of California.

THE TWO DECREES ARE THE SAME.

Findings made by a Court even when not required are of great importance in determining what issues were disposed of.

Last Chance Mining Co. v. Taylor Mining Co., 157 U. S. 683, 39 L. ed. 859.

Here the findings do at least indicate exercise of the same judicial power.

The United States District Court was required to find in this proceeding exactly what it was required to find and did find in the prior proceeding. Section 83(e) requires that:

1. The Court shall find that the plan is fair, equitable and for the best interests of the creditors and does not discriminate;

2. That it complies with the provisions of this chapter, the reference being to new Chapter X;

3. That it has been accepted as required by the provisions of subdivision (d), the reference being to Section 83;

4. That all amounts to be paid by the petitioner for services and expenses have been disclosed and are reasonable;

5. That the offer of the plan and its acceptance are in good faith; and

6. That petitioner is authorized to take all action necessary to carry out the plan and then the section states:

> "If not so satisfied, the judge shall enter an order dismissing the proceeding."

Now note the determination of the Court in the prior proceeding as incorporated in the final decree rendered therein. We quote from pages 280 and 281 of the final decree contained in the printed transcript of the prior appeal, Respondents' Exhibit "OO":

> "2. Said Plan of Readjustment is fair, equitable and for the best interests of the creditors of petitioner, and does not discriminate unfairly in favor of any class of creditors.

3. Said Plan of Readjustment complies with the provisions of subdivision (b) of Section 80 of Chapter IX of said National Bankruptcy Act.

4. Said Plan of Readjustment has been accepted and approved as required by the provisions of subdivision (d) of Section 80 of Chapter IX of said National Bankruptcy Act.

5. All amounts to be paid by petitioner for services or expenses incident to said Plan of Readjustment have been fully disclosed and are reasonable.

6. The offer of said Plan of Readjustment and its acceptance are in good faith.

7. Petitioner is authorized by law to take all action necessary to carry out said Plan of Readjustment."

Respondents' Exhibit "OO", pp. 208 and 281.

These same determinations were incorporated in Findings XIII, XIV and XV which were made in the prior proceeding.

See printed Transcript, Respondents' Exhibit "OO", pp. 244 and 245.

We next take the single paragraph from the Court's findings *in this case* made under Section 83 and we split the same into paragraphs numbered to correspond with the numbering in the prior decree and we have the following:

2. "That the plan of composition as offered by the petitioner herein is fair, equitable and for the best interests of its creditors and does not discriminate unfairly in favor of or against any creditor or creditors or class of creditors;

3. "that the plan of composition complies with the provisions of Section 83, Chapter IX of the Bankruptcy Act of the United States, and all of the provisions of Public No. 302 enacted by the Seventy-fifth Congress, approved August 16, 1937.

4. "That before the filing of the petition herein, said plan of composition was accepted and approved in writing by or on behalf of creditors of petitioner owning and holding more than ninety per cent (90%) of the aggregate amount of claims of all classes affected by such plan, excluding, however, claims owned, held or controlled by petitioner;

5. "that all amounts to be paid by petitioner for services or expenses incident to the composition have been fully disclosed and are reasonable and

6. "that the offer of the plan and its acceptance are in good faith;

7. "and petitioner is authorized by law upon confirmation of the plan to take all action necessary to carry out the terms thereof."

(Tr. p. 214, Vol. 1.)

Finding 6 made by the Court in this proceeding is to the effect that all the allegations of the petition are true.

(Tr. p. 215, Vol. 1.)

The said petition contains precisely what is set forth in the seven detailed findings which we have set forth.

(See par. VI of the Petition, Tr. p. 20, Vol. 1.)

The conclusions of law in this proceeding recite that the petitioner is entitled to an interlocutory decree

which conforms to Section 83. This interlocutory decree also proceeds to find that all the allegations of the petition are true.

(See par. 6 of Interlocutory Decree, Tr. p. 226, Vol. 1.)

Three times then, the Court determined what was determined in the prior proceeding.

The interlocutory decree further sets forth the mechanics of the settlement, *after the doom of the bondholders has been spelled.* It prescribes exactly what the procedure will be for the paying of the cash for the bonds and coupons.

(Tr. pp. 232 to 235, Vol. 1.)

No one ever dreamed of assailing Section 80 because of any inadequacy in the method of settling, once the Court made the decree that the bonds should be settled at the rate of 51.501% on the dollar of principal. In fact the final decree in the prior case set out an orderly and careful procedure for the turning in of the bonds and the receipt of the cash therefor *and the issuance of the new bonds to the R. F. C.*

(Respondents' Exhibit OO, pp. 278-282.)

AS TO INTERFERENCE.

It is respectfully pointed out that in its general character and as regards grant of power to and limitation on power of the federal agency, the United States District Court, Section 83 was not a different law. It was a law in the same terms emanating from the same Constitution of limited or granted power.

It produced the same decree, following a trial at which was introduced all the evidence used in the first trial. It used the same condemned agency to destroy the same bonds.

True, Section 83 calls the decree an interlocutory decree and says that before the "discharge" occurs, you shall have the "final" decree, whereas Section 80 called for a single funeral ceremony. But a judgment which actually determines a case is, in substance, a final judgment although it requires further steps to carry it out.

Guaranty Trust etc. Bank v. Los Angeles, 186 Cal. at pages 116 and 117.

All decrees of the Circuit Courts of Appeals and of United States District Courts which were entered pursuant to the ruling in the *Ashton* case were based upon the broad proposition that the use of a decree of a United States District Court to fasten into the debt structure of an irrigation district a new type of indebtedness for the purpose of discharging old indebtedness of such district constituted an unauthorized interference with the sovereignty of the state; that the power was not within the bankruptcy clause of Article I, Section 8, of the Constitution, because of the nature of the indebtedness; and the state could not waive the point by adopting the federal remedy of bankruptcy because of the contract clause, Article I, Section 10. The *Bekins* case says the interference is innocuous.

But we urge that the power to determine a plan affecting $16,190,000 of public indebtedness dependent

for payment on a taxing district comprising the most valuable part of large county and containing various incorporated cities and towns is no mean power. An elaborate trial was had. Stay of all proceedings against the district was enjoined by the Federal Court. The plan in each case contemplated that. The second plan was but a renewal of the first plan. *By this and the prior proceeding* the district has withheld payment of a 5 cent piece on any of its bonds for over six years and it may take another year to end this cause. That has a vital bearing on public credit. It was not mere fancy that the provision for the making of a federal decree might have a material effect on the fiscal affairs of Merced Irrigation District. The decree lops off over $8,000,000.00 in debts and fastens a new type of bonds upon the district which are to be received by the Reconstruction Finance Corporation.

The very threat of the powers here involved will for years to come cast doubt on the security resting on the obligation to pay taxes. Section 80 was and Section 83 is an invitation to default. It is not a nice thing to urge that means of escape from an obligation may encourage default, but we contend that securities of the highest known quality have been degraded by these laws.

It is true the district initiates the proceeding, but on doing so it is subject to a judgment of a branch of the federal government, the judiciary. The federal government designed the procedure. The Court says to the district and the dissenting bondholders: The

plan shall go into effect if and only if the Court decides upon the evidence that it is fair and shall be put into effect. The fact that the decree is called one of confirmation makes it none the less the act which does fix the new debts into the debt structure of the district. The fact that it does and that we have a federal court decree is the thing that requires surrender of the old bonds.

We have a mixing of jurisdiction which for over a hundred years was not deemed permissible. The final ruling of the Supreme Court is that the boundaries of the grant of bankruptcy power remain undefined.

Wright v. Union Central Life Ins. Co., 304 U. S. 502, 513, 82 L. ed. 1490, 1499.

Many cases were cited by the learned Supreme Court but not the *Ashton* case.

The Argument already made in part may be divided into the points next stated. Among the most important, in view of the District Court's opinion, is Point IV that the judgment relied on is a judgment of this Court and is not a judgment of a court without jurisdiction.

POINTS ARGUED.

I. THE PRIOR JUDGMENT PASSED ON AND DETERMINED THE QUESTION HERE INVOLVED—THAT UNDER THE BANKRUPTCY CLAUSE (ART. I, SEC. 8) THE DISTRICT COURT COULD NOT BE GRANTED THE AUTHORITY PROVIDED IN SECTION 83 AND THAT THE STATE COULD NOT ACCEPT

THE FUNCTIONING OF SUCH AGENCY UNDER THE PROHIBITION OF THE CONTRACT CLAUSE (ART. I, SEC. 10).

(a) SECTION 83 EMPLOYS THE SAME CONDEMNED AGENCY, THE UNITED STATES DISTRICT COURT.

(b) THE GRANT OF POWER TO THAT COURT IS IN THE SAME TERMS.

(c) THE DECREE RENDERED IS IN THE SAME TERMS.

(d) THE CONSENT IS THE SAME CONSENT.

(Argued in the Statement.)

II. IT IS OBVIOUS THAT SECTION 80 WAS NOT INVALIDATED FOR FAILURE TO ACCORD DUE PROCESS OF LAW.

(a) IT REQUIRED PLEADINGS, PROCESS, A FAIR HEARING, EVERY ORDINARY ESSENTIAL TO THE EXERCISE OF JUDICIAL POWER.

(b) IT REQUIRED A FAIR PLAN.

(c) IT WAS PATTERNED ON SECTION 77, THE RAILROAD REORGANIZATION ACT, WHICH HAD BEEN UPHELD BEFORE THE ASHTON CASE WAS DECIDED.

(d) SECTION 77 (b) FOLLOWED THE SAME PATTERN AND THAT ACT HAS BEEN CONSTANTLY APPLIED.

Page 41 hereof.

III. UNDER A CONSTITUTIONAL FORM OF GOVERNMENT, ALL LAWS, ALL GRANTS OF POWER ARE SUBJECT TO JUDICIAL POWER AND MUST STAND THE TEST OF THE CONSTITUTION, THE JUDICIARY APPLIES ITS TEST, AND A JUDGMENT ON CONSTITUTIONALITY IS RES JUDICATA.

Page 42 hereof.

IV. An appellate court is empowered to pass finally on the question of jurisdiction of a trial court.

The judgment here involved is in effect a judgment of this court determining finally the validity of the attempted grant of judicial power to the United States District Court.

The rule applies to determination of questions of jurisdiction which are purely questions of law.

Page 45 hereof.

V. The rule of res judicata applies to all questions of law, to the constitutionality of granted power, whether administrative or judicial, to validity of laws, ordinances and contracts.

Injunction is a common remedy against invasion of private rights under unconstitutional authority.

Page 50 hereof.

VI. Rights vest under a determination made by a final decree and the Legislature cannot destroy such rights.

Page 59 hereof.

VII. The doctrine of res judicata is essential to an orderly judicial system.

Page 60 hereof.

POINT I.

(This point has been argued.)

POINT II.

IT IS OBVIOUS THAT SECTION 80 WAS NOT INVALIDATED FOR FAILURE TO ACCORD DUE PROCESS OF LAW.

(a) IT REQUIRED PLEADINGS, PROCESS, A FAIR HEARING, EVERY ORDINARY ESSENTIAL TO THE EXERCISE OF JUDICIAL POWER.

(b) IT REQUIRED A FAIR PLAN.

(c) IT WAS PATTERNED ON SECTION 77, THE RAILROAD REORGANIZATION ACT, WHICH HAD BEEN UPHELD BEFORE THE ASHTON CASE WAS DECIDED.

(d) SECTION 77 (b), FOLLOWED THE SAME PATTERN AND THAT ACT HAS BEEN CONSTANTLY APPLIED.

It is obvious that Section 80 could not have been invalidated because it failed to require a determination by the Court that the plan to be enforced was fair. It is equally obvious that the section could not have been invalidated for failure to accord due process of law or a fair hearing to the dissenting bondholders. In the first place it is clear that Section 77 of the Bankruptcy Act relating to the reorganization of railroads engaged in interstate commerce was the pattern which was followed in the adopting of Section 80 on *May 24, 1934.* Section 77 was adopted on *March 3, 1933.*

Chap. 204, 47 Stats. at L. 1467.

In adopting Section 77B relating to the reorganization of corporations generally, Congress likewise followed the pattern of said Section 77. Section 77B was adopted on *June 7, 1934.*

Chap. 424, 48 Stats. at L. p. 911.

Each one of these sections required that the court should determine that the plan of reorganization should be fair and that all creditors should be ac-

corded a full and a fair hearing. In his dissenting opinion in the *Ashton* case, Justice Cardozo took pains to point out that Section 80 was skillfully drawn. *Before Section 80 was invalidated, Section 77 had been fully sustained.*

Continental Illinois Nat. Bank & T. Co. vs. Chicago R. I. & P. R. Co., 294 U. S. 648, 79 L. ed. 1110 (decided April 1, 1935).

POINT III.

UNDER A CONSTITUTIONAL FORM OF GOVERNMENT, ALL LAWS, ALL GRANTS OF POWER ARE SUBJECT TO JUDICIAL POWER AND MUST STAND THE TEST OF THE CONSTITUTION, THE JUDICIARY APPLIES ITS TEST, AND A JUDGMENT ON CONSTITUTIONALITY IS RES JUDICATA.

The Supreme Court said:

> "The Constitution, by its own terms, is the supreme law of the land, emananting from the people, the repository of ultimate sovereignty under our form of government. A congressional statute, on the other hand, is the act of an agency of this sovereign authority, and, if it conflict with the Constitution, must fall; for that which is not supreme must yield to that which is. To hold it invalid (if it be invalid) is a plain exercise of the judicial power,—that power vested in courts to enable them to administer justice according to law."

Adkins v. Children's Hospital, 261 U. S. 525, 544, 67 L. ed. 785, 791.

Parliament on the other hand is supreme.

1 Blackstone Comm. p. 161.

While the federal Constitution is a most solemn grant or charter of powers, authority exercised under laws made pursuant to it is constantly tested.

In last analysis, adjudging that particular authority is outside that compact is no more than judging that an agent acting under a power of attorney or a trustee acting under a trust was not given authority to dispose of property. It was at once established that the federal courts must pass on every statute or grant of power enacted by Congress.

> "If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it were a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration."
>
> *Marbury v. Madison,* 1 Cranch 137, 177, 2 L. ed. 60, 73.

> "It is now settled doctrine 'that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected *an unconstitutional act,* violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.' "
>
> *Cavanaugh v. Looney,* 248 U. S. 453, 456, 63 L. ed. 348, 358.

The text Freeman further states:

> "An adjudication as to the *constitutionality* of a law *upon which a claim* or *cause of action is based* is *res judicata* so far as that claim or cause of action is concerned even though in another case in a higher court the law is adjudged constitutional."
>
> Freeman on Judgments (5th ed.), Sec. 711, p. 1499.

Cooley, Const. Lim., p. 5, states:

> "In American constitutional law, the word constitution is used in a restricted sense, as implying *the written instrument agreed upon by the people of the Union,* or any one of the States as the absolute rule of action and decision for all departments and officers of the government, in respect to all points covered by it, which must control until it shall be changed by the authority which established it."

Construction of contracts or city charters is constantly before the courts.

There is no reason why the proper court may not construe the "written instrument," the Constitution, as containing no clause that says Congress may empower a United States District Court to fasten into the debt structure of a California irrigation district a new type of debts and thereby discharge its existing indebtedness; that that would constitute material and unauthorized interference with state sovereignty.

POINT IV.

AN APPELLATE COURT IS EMPOWERED TO PASS FINALLY ON THE QUESTION OF JURISDICTION OF A TRIAL COURT.

THE JUDGMENT HERE INVOLVED IS IN EFFECT A JUDGMENT OF THIS COURT DETERMINING FINALLY THE INVALIDITY OF THE ATTEMPTED GRANT OF JUDICIAL POWER TO THE UNITED STATES DISTRICT COURT.

THE RULE APPLIES TO DETERMINATION OF QUESTIONS OF JURISDICTION WHICH ARE PURELY QUESTIONS OF LAW.

A judgment entered pursuant to a mandate of an Appellate Court *is, in substance, the judgment of the Appellate Court* and it is non-appealable and unchangeable.

> "In *Stewart v. Salamon,* 97 U.S. 361 (Bk. 24 L. ed. 1044), this rule was promulgated: 'An appeal will not be entertained by this court from a decree entered in a circuit court or other inferior court in exact accordance with our mandate upon a previous appeal. *Such a decree when entered is in effect our decree,* and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will, upon the application of the appellee, examine the decree entered and, if it conforms to the mandate, dismiss the case with costs. If it does not, the case will be remanded, with appropriate directions for the correction of the error.' "
>
> *MacKall v. Richards,* 116 U. S. 45, 29 L. ed. 558.

The following case states the point and summarizes the authorities:

> *Peavy-Byrnes Lumber Co. v. Commissioner,* 86 Fed. (2d) 234, 235.

A judgment of affirmance or a directed judgment is absolutely unalterable.

Ex parte Washington & Georgetown Rr. Co., 140 U. S. 91, 35 L. ed. 339.

In its relation to the trial court, the judgment of this court was not in principle different from a decree enjoining the exercise of unconstitutional administrative power.

The Supreme Court of any state conclusively determines the jurisdiction of trial courts of the state. Such a judgment is in no sense a nullity. The language of Chief Justice Marshall in the opinion in the following case is directly in point:

> "It is not to be admitted that the court whose judgment has been reversed or affirmed, can rejudge that reversal or affirmance; but it must be conceded that the court of *dernier* resort in every State decides upon its own jurisdiction, and upon the jurisdiction of all the inferior courts to which its appellate power extends. Assuming these propositions as judicial axioms, we will inquire whether the judgment of the Court of Errors for the State of New York is in violation of the mandate of this court."
>
> *Davis, Consul, etc. v. Packard,* 8 Peters 308, 323, 8 L. ed. 957, 961.

The full faith and credit provision applies to judgments of the highest court of a state as to the power of trial courts within the state. On this point it was remarked with respect to a judgment of the Supreme Court of Pennsylvania:

> * * * and in rendering its judgment of affirmance the court necessarily determined its own jurisdiction."
>
> *Van Matre v. Sankey,* 148 Ill. 536, 36 N. E. 628, 23 L. R. A. at p. 671.

Specifically the Supreme Court recognizes that the judgment of an appellate court may become *res judicata* on the question of power or jurisdiction vested in a trial court.

In the following case the Supreme Court of the United States reversed a Circuit Court of Appeals judgment, the latter court having declined to hold that the Supreme Court of a State had, on appeal from a lower state court, power finally to determine jurisdiction in favor of such lower state court. The state court judgment had been pleaded as *res judicata.* The claim was that the state courts had in rendering the judgments invoked exercised power legislative in character.

> *Forsyth v. City of Hammond,* 166 U. S. 506, 41 L. ed. 1095.

As will be shown, it is quite common to obtain judgments against the validity of administrative power or as to the validity of laws affecting property rights or personal rights. It is equally clear that judgments may be obtained determining that judicial power is invalid or valid. The issue may be purely one of law arising on the face of the record. If the remedy is not plain, speedy or adequate, resort may be had to prohibition or mandamus in order to test

the validity of a trial court's power. If the special proceeding does not lie, the question of jurisdiction is tried out on appeal, but the judgment that is obtained is *res judicata as between the parties in any cause involving the same issue.* This is clearly shown by the Supreme Court case already cited.

Stoll v. Gottlieb, 305 U. S. 165, 83 L. ed. (Adv. Sheets) p. 116.

The case clearly shows that the Supreme Court has now established it as the rule that a trial court may, generally speaking, determine its own jurisdiction, in case the issue of jurisdiction is contested, that it may do this even though jurisdiction or want of jurisdiction appears on the face of the record, at least if there is such degree of uncertainty in the statute purporting to confer jurisdiction as to actually call for judicial construction. The case shows that the trial court's judgment in the event there is reasonable ground for dispute becomes binding and may be invoked in support of the plea of *res judicata.*

Judge McCormick's opinion is based on general rules which are not applicable. The following text states:

> "There can be no doubt that the dismissal of an action or denial of relief for want of jurisdiction is not a judgment on the merits and cannot prevent the plaintiff from subsequently prosecuting the action in any court authorized to determine it."
>
> Freeman on Judgments (5th ed.), Sec. 733, p. 1546.

But says the author:

> "Questions of *jurisdiction* may become *res judicata* the same as any other matters of *law or fact where they are properly in issue or are necessarily involved and determined.*"
>
> Id. Sec. 710, p. 1498.

The author refers to the fact that a final writ of prohibition does adjudicate the question of power.

But it is certainly safer to test out the question of jurisdiction and power of a trial court by an appeal than it is by an application for a writ of prohibition because in some jurisdictions the opposite party is not a necessary party to an application for a writ of prohibition. *In some cases the statute makes him a necessary party. But the rule differs in different jurisdictions.*

50 Corpus Juris, page 699.

It is not arguable that if a party appeals on the question of jurisdiction he and his adversary are not parties to the final judgment.

Prohibition will not lie, nor will certiorari lie where the question of jurisdiction can be conveniently determined by an appeal. It makes no difference that the judgment will be void in an "extreme sense."

White v. Superior Court, 110 Cal. 54.

The general rule is that if a case is dismissed for want of jurisdiction, the judgment is not a bar or an estoppel on the merits.

Smith v. McNeal, 109 U. S. 426; 27 L. ed. 986.

The general rule is thus stated:

> "But where the question of jurisdiction is one of law, a court cannot by an erroneous decision acquire jurisdiction which it has not or divest itself of jurisdiction which it has."
>
> 15 Corpus Juris p. 853.

The general rule is that assumption by a trial Court of power to proceed in a cause when the power does not exist does not create jurisdiction.

> *Brougham v. Oceanic Steamship Co.,* 205 Fed. 857, 126 C.C.A. 325.

But the trial Court may, of course, determine all questions of fact not required to be matter of record and which are essential to jurisdiction.

> *Toy Toy v. Hopkins,* 212 U. S. 542, 53 L. ed. 645.

POINT V.

THE RULE OF RES JUDICATA APPLIES TO ALL QUESTIONS OF LAW, TO THE CONSTITUTIONALITY OF GRANTED POWER WHETHER ADMINISTRATIVE OR JUDICIAL, TO VALIDITY OF LAWS, ORDINANCES AND CONTRACTS.

INJUNCTION IS A COMMON REMEDY AGAINST INVASION OF PRIVATE RIGHTS UNDER UNCONSTITUTIONAL AUTHORITY.

A constitution is a compact between the states. It is a charter of authority. It may be finally construed in litigation between parties, like any other contract. The question is one of law.

We mention another tax case. The same charter granted by the State of South Carolina lay at the base

of the two decisions involved and the question in this tax case also was, Was the prior decision placed on the ground of exemption generally? It was so ruled. The facts were: *In 1868 South Carolina passed a law* for the assessment of the property of a successor corporation. One Pegues, a stockholder, brought suit to enjoin that corporation from paying the taxes assessed, claiming that the taxing was not permissible under the charter of the ~~latter~~ predecessor corporation. The Attorney General of the State appeared for the tax officials and their answer denied the existence of the contract exemption. The Court perpetually enjoined the collection of the taxes on the ground of the charter exemption and this judgment was affirmed (*Humphrey v. Pegues,* 16 Wall. 244, 21 L. ed. 326). *Later on in the year 1900 South Carolina passed a new taxing statute* providing again for taxing the property of the corporation. This second law was invalidated under the rule of *res judicata,* the Supreme Court holding that the question of right to tax at all was embraced in the first judgment, that the first case involved a construction of the company's charter. It said:

> "That the issue in the case was the existence of a charter *exemption* from taxation in favor of the Cheraw & Darlington Railroad Company and the consequent *want of power* of the state to tax the *property of the railroad during the continuance of the exemption is obvious.* And that the decree rendered in the case established the exemption embraced in the issue is also obvious. This being true it unquestionably follows that the

> decree established as to the parties and their privies *the very question in issue* in this proceeding."
>
> *Gunter v. Atlantic Coast Line R. Co.,* 200 U. S. 273 at 290, 50 L. ed. 486, 487.

The Supreme Court upheld the plea. It cited the case which has been cited many times on the point that where a question upon which a right depends is determined in a prior suit the determination is binding in a second suit.

> *New Orleans v. Citizens Bank,* 167 U. S. 371, 42 L. ed. 202.

Section 83 might have varied the procedure of Section 80 and changed names of different steps in the proceeding. It might have said that if ten percent or no percent of the creditors consented to a plan the Court could enforce it. But the truth is that notwithstanding any changes in words or lettering of sentences, the trial eventuates in that which offends the sovereignty of the state in the same manner that the decree of Section 80 offended, as determined in the *Ashton* case. It was not the form of trial, the form of the petition, the form of the consents or the name of the decree that counted. It was that an effectuating federal decree was not permissible under our plan of separate sovereignties.

And if a court enjoins the enforcement of a law because it is unconstitutional or because the part of it which is assailed is unconstitutional it is trifling with judical power to say the judgment may be de-

stroyed by the device of repeating the legislation in a new act. The legislature cannot destroy adjudications of right in that way.

A sales stamp company began business in West Virginia. The State Tax Commissioner notified them to pay a license tax of $500.00. Suit was started at the suggestion of the Commissioner to enjoin the tax. The complaint filed in the state court charged the tax *law* was *unconstitutional.* The Court sustained a demurrer. On appeal *the Supreme Court of the State affirmed the decree.* Later the stamp company went into the federal court charging again the act was unconstitutional, but the bill showed the prior proceeding. A demurrer was sustained by three federal judges on the ground of *res judicata.*

Sperry & Hutchinson Co. v. Blue, 202 Fed. 82.

> "A judgment upholding the *validity* of an ordinance regulating the height of billboards is *res judicata* as between the same parties in a subsequent suit to restrain its enforcement *with respect to other structures* of the same character. * * * And a judgment establishing a claim dependent upon a particular statute *necessarily* adjudicates the validity and constitutionality of that law."
>
> Freeman on Judgments (5th ed.), Sec. 709, pp. 1496-7.

Neither national or state agencies are immune from injunction when attempting to act under unconstitutional or invalid authority.

Injunction lies against enforcement of regulations relating to the oil industry which have been promulgated under a grant of authority to the President determined to be outside the Constitution.

Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446.

Is it not clear that the oil company which obtained the adjudication of invalidity of the grant of power could not be endlessly harassed by repeating the same grant in a new act? Obviously the only difficulty would be that appearing in the tax exemption cases—whether the government was a party to the prior proceeding.

Obviously the government is a party to a criminal proceeding and it is held that the plea of *res judicata* applies in such proceedings as well as the plea of once in jeopardy. Error in the prior ruling on a special plea in bar becomes immaterial once the ruling is final. It was purely a question of law.

United States v. Rabinowich, 238 U. S. 78, 59 L. ed. 1211.

Yosemite Park & C. Co. had authority from the federal government to sell liquor in Yosemite Park. The State had, subject to certain qualifications, granted to the federal government jurisdiction over the park area. The State endeavored to compel the company to take out a liquor license which was merely *regulatory* and not for revenue. The company brought suit against Collins, the enforcement officer, to enjoin the enforcement of the State Act. It was ruled that while the State could levy excise taxes

on the liquor business within the park, regulatory licensing was not permitted *and an injunction was granted to the company.*

Collins v. Yosemite Park & C. Co., 304 U. S. 518, 82 L. ed. 1502, 82 L. ed. (Adv. Sheets) p. 1009.

That case involved a species of "treaty" between sovereigns, the state and the federal government. *It involved a grant of authority, such as the Constitution.*

Is it conceivable that if the State's officers later sought to enforce the same invalidated law or any other license law the injunction judgment which construed the limits of the "treaty" would not have been binding?

We have mentioned the case of *United States v. Moser.* In that case the court specifically held the rule applies to questions of law. And the causes of action were different. One Moser obtained a judgment in the Court of Claims against the United States in a suit for an installment of his pay as a retired officer based on the theory that his service in the Naval Academy was within the definition of Civil War naval service referred to in an act fixing his pay. The judgment became final. The law, as applied to the undisputed facts, was in a suit by another claimant later held to have been erroneously determined. In a suit for a subsequent installment of his salary, Moser claimed that the question of right had been determined in the prior suit and the Supreme Court upheld this contention. It said:

"The contention of the government seems to be that the doctrine of *res judicata* does not apply to *questions of law;* and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon *a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question or right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged, but, at the same time, *deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based.*"

United States v. Moser, 266 U. S. 236, 242, 69 L. ed. 262, 264.

It is of course elementary that the prior determination may defeat the second case although the causes of action are different, so long as the determination of the same question or right or fact is established.

Myers v. International Trust Co., 263 U. S. 64, 68 L. ed. 165.

However, it adds to the force of the plea when invoked against a new statute to show that as to relevant parts involved, the wording is the same. Such was the following case: A taxpayer obtained a judgment in one case that, in determining its net income, it was entitled to a certain deduction based upon the construction of the statute and regulations that were

then in force. The same deduction was claimed by the taxpayer under the new income tax acts which were cast in the same form and the Court noted that the regulations promulgated by the Secretary of the Treasury pursuant to the new acts were in the same form. The suit was for refund of taxes claimed to have been illegally collected by the government during a series of years. The taxpayer had claimed annually over a period of years as a deduction from gross income an amortized proportion of the discount on sales of certain bonds by certain companies. The Commissioner of Internal Revenue had disallowed the claimed deduction for the years 1918 and 1919 and the Board of Tax Appeals had sustained the ruling, but on a review the Circuit Court of Appeals for the Fourth Circuit had reversed the decision of the board. In its returns for 1923, 1924 and 1925 the deductions were claimed but were disallowed and the taxes were paid under protest. Suits were filed. The cases were consolidated. The taxpayer pleaded that the issue involved was *res judicata.* The point was sustained by the District Court and the Circuit Court of Appeals (62 F. (2d) 933). The Supreme Court of the United States granted a review, and upheld the defense of *res judicata.* We quote:

> "The scope of the estoppel of a judgment depends upon whether the *question* arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or *question* to be determined in the later

action is the same as that litigated and determined in the original action. *Cromwell v. Sac County,* 94 U. S. 351-353, 24 L. ed. 195-198; *Southern P. R. Co. v. United States,* 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 S. Ct. 18; *United States v. Moser,* 266 U. S. 236, 241, 69 L. ed. 262, 264, 45 S. Ct. 66. Since the claim in the first suit concerned taxes for 1918 and 1919 and the demands in the present actions embraced taxes for 1920-1925, the case at bar falls within the second class. The courts below held the *lawfulness* of the respondent's deduction of amortized discount on the bonds of the predecessor companies was adjudicated in the earlier suit."

Tait v. Western Maryland R. Co., 289 U. S. 620, 623, 77 L. ed. 1405, 1407, 1408.

The Court also said:

"Is the *question* or *right* here in issue the same as that adjudicated in the former action? *The pertinent language of the Revenue Acts is identical;* the regulations issued by the Treasury remained unchanged; and of course the facts with respect to the sale of the bonds and the successive ownership of the railroad property were the same at the time of both trials."

Tait v. Western Maryland R. Co., 289 U. S. 620, 77 L. ed. 1405, 1409.

Note that the Supreme Court held that the "lawfulness" of the deduction had been determined. The acts were identical. The causes of action were different.

Freeman on Judgments, 5th ed., Sec. 672, states:

"If the existence, *validity* or *construction of a contract,* lease, conveyance or other obligation

has been adjudicated in one action it is *res judicata* when it comes again in issue in another action between the same parties, though the immediate subject matter of the two actions be different."

POINT VI.

RIGHTS VEST UNDER A DETERMINATION MADE BY A FINAL DECREE AND THE LEGISLATURE CANNOT DESTROY SUCH RIGHTS.

In a revision of its insolvency laws, the State of Massachusetts had divided the State into districts. The law designated the judges who might sit in insolvency cases in the event the local judge was unable to act. One of the judges had resigned. An outside judge was called in in an insolvency case but his selection was not in accordance with the statute. He proceeded to act. Certain creditors brought suit in the court of a supervisory jurisdiction and obtained an injunction against the carrying on of the insolvency proceedings and prohibiting the judge from acting. Later on the legislature of Massachusetts passed a law that purported to validate all of the proceedings which had been assailed. The Supreme Court of Massachusetts pointed out that the injunction judgment was final and that it was *res judicata* and that it was beyond the power of the legislature to defeat that judgment; that this would constitute an unauthorized interference with judicial power. The question was purely one of law.

Denny v. Mattoon, 2 Allen (84 Mass.) 361.

The case has been cited over and over again on the want of power in the legislative department to inter-

fere with judgments or judicial proceedings. Of a judgment the following case said:

> "If rightful the plaintiff therein had a vested right which no state legislation could disturb. It is not within the power of a legislature to take away rights which have been once vested by a judgment."
>
> *McCullough v. Commonwealth of Virginia,* 172 U. S. 102, 123, 43 L. ed. 382, 390.

POINT VII.

THE DOCTRINE OF RES JUDICATA IS ESSENTIAL TO AN ORDERLY JUDICIAL SYSTEM.

This point has been made clear.

Dated, Berkeley, California,
October 16, 1939.

Respectfully submitted,
CLARK, NICHOLS & ELTSE,
Attorneys for Appellant,
Mary E. Morris.

(Appendix Follows.)

Appendix.

Appendix

ASSIGNMENTS OF ERROR.

Various assignments of error cover the overruling of the plea of *res judicata.* Assignments of Error 71 to 92, inclusive, embraced every possible phase of the plea. Sufficient in the way of objection, however, was incorporated in Assignments of Error 82 to 92, inclusive, which read as follows:

"82. The Court erred in failing to find that those powers which were conferred upon the trial court by what is known as Section 83 of the Federal Bankruptcy Act are the same as the powers which Congress undertook to confer upon the said Court under Section 80 of said Act and that the appeal taken in said other proceeding by the non-assenting bondholders was in part upon the ground that the granting of the powers referred to was in excess of the power of Congress and could confer no jurisdiction upon the said trial court.

83. The Court erred in failing to find that the decree dated April 12, 1937, which is referred to in the aforesaid finding, was based directly upon and did determine that the grant of powers to readjust the indebtedness referred to, which powers the said trial court undertook to exercise, was in excess of the power of Congress and that this had been determined in the case of Ashton et al. v. Cameron County Water Improvement District No. 1, 298 U. S. 513.

84. The Court erred in failing to find that it was, by virtue of the said decree of the said United States Circuit Court of Appeals, finally and forever deter-

mined as between the petitioner herein and each and all of the dissenting bondholders, appellants herein, that the grant of powers contained in Section 83 of the Federal Bankruptcy Act, under which section this proceeding was begun and prosecuted, was unconstitutional and beyond the power of Congress to make, and that the trial court could not in reliance upon an identical grant of powers undertake to do substantially the same thing in the matter of readjusting the indebtedness represented by the bonds held by the dissenting bondholders as was attempted to be done in said prior proceeding.

85. The Court erred in failing to find that the decree entered by the trial court on the going down of the mandate following the making of said decree by said United States Circuit Court of Appeals was not a final adjudication and bar in favor of the dissenting bondholders to the same extent and in the same manner in which the said decree of the said United States Circuit Court of Appeals constituted an adjudication and bar against the petitioner.

86. The Court erred in failing to find that the decree last named became non-appealable and final because it was entered pursuant to the mandate of said United States Circuit Court of Appeals.

87. The Court erred in failing to find that the decree of said United States Circuit Court of Appeals was final.

88. The Court erred in failing to find that the decree entered upon said mandate was final.

89. The Court erred in failing to find that the petitioner herein was estopped, by virtue of the proceedings referred to in the preceding assignment and by virtue of the proceedings which are referred to in Finding VII of the Court, from asserting that the trial court did in this proceeding have the power to make any of the findings which subdivision (e) of Section 83 of the Federal Bankruptcy Act required it to find as a condition of its confirming or approving the petitioner's plan of debt readjustment.

90. The Court erred in failing to find that the particular issue as to the validity of the powers referred to in said subdivision (e) and the right of the trial court to exercise said powers were involved and were necessarily involved in the trial of said prior proceeding, and said issue was determined in favor of the dissenting bondholders in this case.

91. The Court erred in failing to find that the issues and the parties in the two proceedings were the same and that the subject matter or res in the two proceedings was the same and that the Court could not have been required to dismiss said other proceedings by the judgment of the Circuit Court of Appeals without a determination that there was no right in the petitioner district to have the debts involved in this case readjusted under alleged bankruptcy power of the kind attempted to be exercised in this case or under any type of bankruptcy power.

92. The Court erred in failing to find that the attempted exercise of power involved in this proceeding was the same as that involved in the prior proceed-

ing and that it had been finally adjudicated in favor of the dissenting bondholders that the obligations represented by their bonds could not be impaired or changed by the exercise of any so-called Federal Bankruptcy power or by the exercise of the particular powers mentioned in Section 83 of the Federal Bankruptcy Act."

Tr. pp. 297 to 300, Vol. II.

The designation of points also included an assignment of the point of *res judicata,* as follows:

"4. The cause is *res judicata.*"

Tr. p. 319, Vol. II.

THE EVIDENCE IN SUPPORT OF THE PLEA.

While this Court has held that in determining the plea, evidence must be introduced——

National Surety Co. v. United States (9th Ct.), 29 F. (2d) 92

—the Court will take judicial knowledge of its own records on the plea——

Divide Creek Irr. Dist. v. Hollingsworth (10th Ct.), 72 F. (2d) 937

—in which case it was said:

> "When the Supreme Court of the United States or other appellate tribunal, can end litigation by an examination of its own records, it is in the interest of justice that it do so."

In judging the plea of *res judicata* it is permissible to refer to the entire record of a prior proceeding to

determine whether a particular question was determined therein.

Oklahoma v. Texas, 256 U. S. 70, 88, 65 L. ed. 831, 835.

"It is well settled, however, that a decree is to be construed with reference to *the issues it was meant to decide.*"

Vicksburg v. Henson, 231 U. S. 259, 274, 58 L. ed. 209, 231.

The record on appeal by appellants in the prior proceeding consists of the printed record on the application of the district for a review by the Supreme Court of this Court's judgment in the prior proceeding.

Respondents' Exhibit "OO".

We specify the proceedings shown in said exhibit and by the printed transcript on appeal herein.

1. On April 19, 1935, the district filed petition under Section 80 to readjust its bonded indebtedness amounting to $16,190,000.00. Its plan was to pay off this debt at 51.501% of principal, the settlement to discharge any interest accruing on or after July 1, 1933, and the money to be supplied by a new bond issue to be taken by the Reconstruction Finance Corporation.

Respondents' Exhibit OO, pp. 9 to 40;
Filing date, page 41.

2. In said proceeding appellants appeared. They moved to dismiss and they pleaded the same ownership of bonds which they plead in this proceeding and they objected to the jurisdiction of the Court and as-

sailed Section 80 on various grounds, claiming particularly that the bankruptcy power did not extend to permitting a Court to interfere with the debts of a California Irrigation District.

The fairness of the plan was assailed on various grounds.

The motions to dismiss are described:

Ex. OO, pp. 43 to 47.

The answers are described:

Ex. OO, pp. 47 to 54.

3. Findings were filed *March 4, 1936.*

Ex. OO, pp. 228 to 249.

4. Decree was filed the same date.

Ex. OO, pp. 275 to 282.

5. A statement of the evidence was stipulated to as a part of the agreed statement on appeal.

Ex. OO, pp. 154 to 222.

6. Petition for appeal and assignment of errors were filed March 28, 1936, the assignments challenging the jurisdiction of the District Court.

Ex. OO, pp. 283 to 298.

7. Bond on appeal and order allowing appeal were filed March 30, 1936.

Ex. OO, p. 287.

Ex. OO, p. 302.

8. As there was some question as to whether this Court should allow the appeal, an additional order was applied for here and granted.

Ex. OO, pp. 304 to 325.

9. The Supreme Court of the United States, on *April 30, 1936,* decided the *Ashton* case.

Ashton v. Cameron Co. Water Improvement Dist., 298 U. S. 513, 80 L. ed. 1309.

On *October 12, 1936,* a rehearing was denied in that case.

10. The appellants moved to dispense with the printing of the record. This written motion concluded:

> "The said Act purports to confer *jurisdiction* on the United States District Courts to confirm and put into effect, as against non-consenting creditors, plans for readjustment of debts of municipalities and other political subdivisions, including Irrigation and similar Districts of any state.
>
> On May 25, 1936, the Supreme Court of the United States, in the case of Ashton, et al. v. Cameron County Water Improvement District No. One, 298 U.S. 513, decided and determined that said Act of Congress was unconstitutional and void. Said decision is now final.
>
> 2. Inasmuch as it has now been finally determined that said Act is unconstitutional and void, it follows that the District Court had no jurisdiction to render the decree appealed from, and it is in the interest of justice that, this court should dispose of the cause immediately."
>
> Ex. OO, p. 336.

11. The Court granted the motion, reversed the judgment and directed the trial Court to dismiss on April 12, 1937. The minute order, ordered the cause

reversed and directed that the trial Court enter judgment of dismissal.

Ex. OO, p. 338.

12. This Court's decree, dated April 12, 1937, followed said order.

Ex. OO, p. 339.

13. The mandate on the decree is set out.

Tr. pp. 962, 964, Vol. III.

14. The trial Court's decree of dismissal is dated July 6, 1937.

Tr. p. 967, Vol. III.

15. The petition filed June 17, 1938, herein presents the same plan. See Exhibit A of petition.

Tr. top of p. 29, Vol. I.

16. The district applied for certiorari and its application was denied on *October 11, 1937.*

Merced Irr. Dist. v. Bekins, 302 U. S. 709, 82 L. ed. 548.

17. The parties stipulated (Tr. p. 64) that only the pleadings of West Coast Life Insurance Company and of Milo W. Bekins et al., and of Mary E. Morris need be printed in full on this appeal and that other dissenting creditors had pleaded the same defenses.

Tr. p. 64, Vol. I.

In paragraph 4 of her answer respondent, Mary E. Morris, pleaded the bar and estoppel of the prior judgment.

Tr. pp. 73 to 80, Vol. I.

In its second separate defense, West Coast Life Insurance Company, did likewise.

Tr. pp. 50 to 52, Vol. I.

Milo W. Bekins et al. pleaded the same judgment.

Tr. pp. 121 to 123, Vol. I.

18. All respondents filed proof of claim.

Tr. p. 994, Vol. III.

19. At the trial the following stipulations were made:

> "It was stipulated that it was obvious that only one mass of bonded indebtedness of $16,190,000 involved in this proceeding was involved in the former proceeding in this court.
>
> It is further conceded that it was stipulated that the various dissenting bondholders owned the bonds which they claimed in their pleadings to own in the other proceeding in this court.
>
> It is further admitted that the bonds, the ownership of which is pleaded in the pleadings in the first case, are the same bonds the ownership of which the respondents plead in this case, except that in this case the respondents plead, in addition, accruing interest upon the bonds.
>
> It is further stipulated that the Supreme Court of the United States ruled upon the petition for writ of certiorari in October, 1937."

Tr. p. 542, Vol. II.

It was stipulated that objection to jurisdiction was made throughout the prior proceeding.

Tr. p. 541, Vol. II.